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NO. 789

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

ALLIS-CHALMERS MANUFACTURING COMPANY, et al.,

Petitioners,

vs.

COMMONWEALTH EDISON COMPANY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Names and Addresses of Counsel Appear at the end of this Petition)

TWENTIETH CENTURY PRESS, INC., CHICAGO

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, defendants in a group of private treble damage antitrust actions involving electrical equipment products brought in the Northern District of Illinois, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled cause on September 12, 1963, rehearing denied October 30, 1963, insofar as it held, reversing the district court, that judgments based on pleas of guilty are admissible as prima facie evidence in these cases under Section 5(a) of the Clayton Act.

OPINIONS BELOW

The opinion of the court of appeals, together with the dissenting opinion of Judge Knoch, is reported at 323 F.2d 412 (7th Cir. 1963) and is reprinted as an appendix to this

petition at pp. A-1-A-8. The opinion of the district court by Judge Robson, is reported at 211 F. Supp. 712 (N.D.Ill. 1962) and the opinion and order appear at Plt. App. 44-80.[1]

JURISDICTION

The opinion of the court of appeals was entered September 12, 1963. The petition for rehearing, timely filed pursuant to an order of the court of appeals entered September 18, 1963, extending the time for filing the petition to October 14, 1963, was denied on October 30, 1963. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254 (1).

STATUTE AND RULE INVOLVED

The full text of Section 5 of the Clayton Act at the time of its enactment in 1914 was as follows (the proviso in issue is italicized) (38 Stat. 731 (1914)):

> "That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided, This section shall not apply to consent judgments or decrees entered before any testimony has been taken: Provided further,* This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in

1. The appendix to this petition is cited "App. —"; the appendix filed by the respondents, Commonwealth Edison Co., et al., in the court of appeals is cited "Plt. App. —"; the appendix filed by petitioners in the court of appeals is cited "Dft. App. —".

equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken."

Section 5 was amended in 1955 to become Section 5(a), but the changes in the text are not significant here. The second proviso, which never had more than temporary application, was repealed. The wording of the affirmative provision of Section 5 was changed to make the section applicable to final judgments or decrees "heretofore or hereafter rendered" and the description of the kinds of cases to which it applied, "in any criminal prosecution or in any suit or proceeding in equity", was changed to accord with the terminology of the Federal Rules, "in any civil or criminal proceeding". The statute now reads (69 Stat. 283 (1955), 15 U.S.C. § 16(a) (1959)):

> "(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under Section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken* or to judgments or decrees entered in actions under Section 15a of this title."

The full text of Rule 11 of the Federal Rules of Criminal Procedure is as follows:

> "A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not

accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

QUESTION PRESENTED

Whether judgments in criminal antitrust cases based on pleas of guilty entered before any testimony was taken are "consent judgments" within the meaning of the proviso to Section 5(a) and exempt, therefore, from the prima facie effect that the section otherwise confers on a "judgment or decree . . . in any civil or criminal proceeding. . . ."

STATEMENT

A sharply divided court of appeals reversed the interlocutory order entered by the district court to strike from the complaint in these proceedings references to prior criminal proceedings brought against petitioners in the Eastern District of Pennsylvania in 1960 and terminated in pleas of guilty, although the court of appeals unanimously affirmed the order to strike references to actions terminated in pleas of *nolo contendere*. These actions were instituted against petitioners, all electrical equipment manufacturers, seeking treble damages under Section 4 of the Clayton Act (38 Stat. 731 (1914), as amended, 15 U.S.C. § 15 (1959)) for alleged violations of Section 1 of the Sherman Act (26 Stat. 207 (1890), as amended, 15 U.S.C. § 1 (1959)). The complaint references to the prior criminal proceedings had been included on the theory that the criminal judgments would constitute prima facie evidence against petitioners in the civil actions by virtue of Section 5(a) of the Clayton Act (38 Stat. 731 (1914), as amended, 15 U.S.C. § 16(a) (1959)).

The majority of the court of appeals reversed Judge Robson's order insofar as it affected the pleading of prior guilty plea judgments on the theory that such judgments are not "consent judgments" within the meaning of the proviso to Section 5(a). The proviso expressly exempts consent judgments from the prima facie evidentiary status the section otherwise accords prior judgments in government proceedings. Judge Knoch wrote a dissenting opinion (App. 7-8) demonstrating that judgments entered on guilty pleas filed before any testimony is taken are consent judgments under even the most liberal construction of the proviso's terms and pointing out that the legislative history conclusively supports the view that the proviso was intended to remove guilty plea judgments from the sanction of Section 5(a).

The guilty plea judgments in question were entered at Philadelphia in response to seven of twenty indictments, each relating to a separate electrical equipment product line. In only two of those seven cases did all defendants enter pleas of guilty. All of the judgments were entered before any testimony was taken. The negotiations between the parties leading to an agreed entry of pleas in these cases is summarized in the affidavit of Howard Aibel, filed in support of petitioners' motion in the district court (Dft. App. 1-11), which also sets forth pertinent excerpts about those negotiations taken from the Philadelphia transcript (Dft. App. 6-11).

The decision of the court of appeals, which petitioners ask this Court to review, was limited to the problem of statutory construction certified to it, "whether plaintiffs in their private antitrust cases may have the prima facie evidentiary benefit provided by 5(a) of the Clayton Act with respect to judgments entered on pleas of nolo contendere and guilty in prior criminal antitrust cases against

the same defendants." (App. 1-2.) The question was certified and heard by the court of appeals under the Interlocutory Appeals Act as "a controlling question of law . . . [determination of which] may materially advance the ultimate termination of the litigation . . ." (28 U.S.C. § 1292(b)). Both courts below, as well as all of the interested parties, recognized the importance in this complex, multiple litigation of having a uniform determination of this issue in advance of the several trials.

ARGUMENT

No "judgment or decree . . . in any civil or criminal proceeding" brought by the government may operate as prima facie evidence under Section 5(a) of the Clayton Act in a subsequent private antitrust action if, under the proviso thereto, it is a "consent judgment or decree entered before any testimony has been taken. . ." The proviso was added to Section 5(a) in the conference committee to resolve a dispute between the two houses as to whether the section's prima facie rule should apply to *any* criminal judgment. In the spirit of compromise the committee retained the statute's application to criminal judgments, added in the Senate, but sought to accommodate the apparently conflicting policies of aiding treble damage plaintiffs and of

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2. The House bill applied only to equity cases and limited the prima facie rule to matters which would create an estoppel as between the original parties (H.R. Rep. No. 627, 63d Cong., 2d Sess. 2 (1914)). Equity consent decrees, which do not ordinarily create such an estoppel, would therefore as a general rule have been exempt from the prima facie provisions of that bill (see p. 12, *infra*). The Senate accepted the estoppel language but amended the bill to make it apply to criminal as well as equity cases (51 Cong. Rec. 13898 (1914)) and thereby brought guilty plea judgments within the proposed prima facie rule.

aiding government enforcement of the antitrust laws by adding the proviso encouraging defendants to consent to judgment before trial. See 51 *Cong. Rec.* 16003-4 (1914).

The decision of the majority of the court of appeals below holding the proviso inapplicable to judgments based on pleas of guilty—the very judgments to which the proviso was originally primarily directed—would destroy that compromise and by judicial fiat nullify the important congressional policy abjuring interference with government antitrust enforcement and, instead, restore the rejected Senate proposal as the law of the land. The appellate ruling thus threatens to overturn the intent of Congress and the interpretation placed on the section by the federal courts and to create new obstacles to effective administration of the antitrust laws.

The holding of the court below is contrary to that reached and respected in earlier decisions and to those of recent district court decisions. This Court should grant certiorari in order to resolve existing and potential conflict and to ensure a uniform and proper construction of this important antitrust provision.

Section 5(a) governs the evidentiary use that plaintiffs in private antitrust actions can make of judgments obtained in prior government actions and, accordingly, affects the rights of all parties to private antitrust litigation following in the wake of criminal antitrust action. By its influence, foreseen by Congress, on the willingness of defendants in criminal antitrust cases to enter pleas of guilty, the section, including its proviso has far-reaching import for the administration and enforcement of the antitrust laws. The Court, in *Emich Motors* v. *General Motors*, 340 U.S. 558 (1951), has already recognized the significance of Section 5(a), and the value of uniform construction and application of it, by granting certiorari to review a question involving inter-

pretation of its main clause. This petition concerns the proviso to Section 5(a), a part of the section not involved in the *Emich* case and never before considered by the Court.

A well-reasoned and comprehensive opinion on the proviso by Judge Nordbye in *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366 (D. Minn. 1939), *aff'd*, 119 F.2d 747 (8th Cir.), *cert. denied*, 314 U.S. 644 (1941), reached the conclusion, contrary to that of the court of appeals below, that guilty plea judgments are exempt from Section 5(a) under its proviso. We think it fair to say that to the time of the inception of the present litigation *Twin Ports* was generally recognized by the federal judiciary as the definitive exposition of the effect of the proviso. See, e.g., *Barnsdall Ref. Corp. v. Birnamwood Oil Co.*, 32 F.Supp. 308 (E.D.Wis. 1940); *Alden-Rochelle, Inc. v. ASCAP*, 3 F.R.D. 157 (S.D.N.Y. 1942). Indeed, we know of no reported case, either before or after *Twin Ports*, in which a judgment based on a plea of guilty has been admitted in evidence under the aegis of Section 5(a).

The question once thought settled has now been reconsidered in five circuits in cases that are a part of this "electrical equipment" litigation. In the Eighth Circuit the proviso has been held, in accord with *Twin Ports*, to exempt judgments based on pleas of guilty, and no appeal has been taken. *N. W. Electric Power Coop., Inc. v. General Electric Co.*, 30 F.R.D. 557 (W.D. Mo. 1961) by Judge Duncan. Thoughtful opinions similarly holding guilty plea judgments outside Section 5(a) were written by Judge Byrne in *Department of Water & Power v. Allis-Chalmers Mfg. Co.*, Trade Reg. Rep. (1963 Trade Cas.) ¶ 70,656 (S.D.Cal. 1963) and Judge Spears in *City of San Antonio v. General Electric Co.*, Civil No. 3063, W.D. Texas, Dec. 7, 1962, and are presently pending on appeal before the Ninth and Fifth

Circuits, respectively. A decision considering the question but reserving it for later separate decision at each of the several trials of the many actions there involved was written by Judge Feinberg in *Atlantic City Electric Co. v. General Electric Co.*, 207 F. Supp. 620 (S.D.N.Y. 1962); no appeal to the Second Circuit has been taken.

2. The decision below overlooks the necessary effect of this Court's decision in *Emich Motors v. General Motors*, 340 U.S. 558 (1951), on the construction of the proviso. The prima facie rule of Section 5(a) is limited by its terms to "matters respecting which said judgment or decree would be an estoppel as between the parties thereto", and in *Emich* the Court construed that language as incorporating the common law doctrine of collateral estoppel into the main provision of Section 5(a). Thus a criminal judgment offered under Section 5(a) can have no broader evidentiary effect than it would have in a later action involving the original parties. The court below held the proviso's intended application to criminal judgments to be limited to judgments based on pleas of *nolo contendere*. But *nolo* judgments, as this Court has affirmed, create no "estoppel as between the parties thereto" and, accordingly, are not within the basic provision of Section 5(a).[3] The appellate court's holding reduces, therefore, to the proposition that the proviso's function is to exclude from the operation of Section 5(a) judgments that, by the settled terms of its main provision, could never come within it.[4] In short, the

3. Hudson v. United States, 272 U.S. 451, 455 (1926); United States v. Norris, 281 U.S. 619 (1930).

4. See Ulrich v. Ethyl Gasoline Corp., 2 F.R.D. 357, 359 (W.D. Ky. 1942); A. B. Dick Co. v. Marr, 95 F. Supp. 83, 101 (S.D. N.Y. 1950); United States v. Jones, 119 F. Supp. 288, 290-291 (S.D. Cal. 1954); United States v. B. F. Goodrich Co., Trade Reg. Rep. (1957 Trade Cas.) ¶ 68,713 at p. 72,871 (D. Colo., Feb. 15, 1957).

decision renders the proviso a redundancy. It is indisputable, however, that when a statute admits a reasonable construction which gives effect to all of its provisions, a construction which makes one part redundant should be rejected. *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 307-308 (1961).

The unequivocal legislative history of Section 5(a) establishes that Congress did not intend the proviso to be redundant. As the court of appeals itself found, a clearly defined purpose motivated its drafting and adoption by the proviso. "Congress sought to aid antitrust enforcement by encouraging defendants to capitulate, at a saving of time and expense to the Government" (App. 5). Certainly Congress would not have taken the trouble to add a proviso intended to embody and carry out so definite a policy if that policy were already sufficiently fostered by the language of the section's affirmative provisions. The legislative history shows, to the contrary, that it was specifically the guilty plea exemption that Congress conceived as effectuating the policy of encouraging "capitulation" or "surrender" (terms used repeatedly by proponents of the proviso), a policy developed by the conference committee in consultation "with the Attorney General of the United States and a great many men . . . interested in the execution of the trust laws . . ." (51 *Cong. Rec.* 16276 (1914)). At the time of its enactment it was agreed that the proviso's primary purpose and justification was

United States v. Cigarette Merchandisers Ass'n, 136 F. Supp. 212, 213 (S.D. N.Y. 1955); Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366, 378 (D. Minn. 1939); Barnsdall Ref. Corp. v. Birnamwood Oil Co., 32 F. Supp. 308, 312 (E.D. Wis. 1940); Department of Water and Power v. Allis-Chalmers Mfg. Co., Trade Reg. Rep. [1962 Trade Cas.] ¶ 70,656 at p. 77,667 (S.D. Cal., Jan. 22, 1963); United States v. Standard Ultramarine & Color Co., 137 F. Supp. 167, 170 (S.D. N.Y. 1955).

to "induce" defendants in criminal antitrust cases "to come in and plead guilty" (*id.* at 15939).

Opposition to the proviso in fact centered on its intended effect of exempting judgments based on pleas of guilty from the operation of the section. Proponents of the proviso, including the conferees who drafted it, accepted that interpretation without apology and, indeed, vigorously defended what was in their view a salutary result. For example, an opponent of the proviso posed this question to Senate Conferee Chilton: "Now, is it [a 'trust'] ... admitted its guilt, and if a private party had a suit against that concern for damages, why should not he be permitted to show that this institution had admitted its guilt?" (51 *Cong. Rec.* 16003.) In answer Senator Chilton, accepting without question the construction of the proviso as exculpating guilty plea judgments, protested that in the view of the six conferees this exclusion was fair and furthered the public interest (*id.* at 16004). Similarly, Senate Conferee Overman agreed that the proviso prevented "making it [a

5. See Judge Nordbye's exhaustive study and analysis of the legislative history in Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366 (D. Minn. 1939), *aff'd*, 119 F.2d 747 (8th Cir.), *cert. denied*, 314 U.S. 644 (1941). The complete citations to the legislative history of the proviso to Section 5 here in dispute are as follows: *Hearings before the House Committee on the Judiciary*, 63d Cong., 2d Sess. ser. 7, pt. 2, 1243-58, 974-5, 1270-82, 4911; H. R. Rep. No. 627, 63d Cong., 2d Sess. 2, 14 (1914) (Minority Report); H. R. Rep. No. 627, Pt. 2, 63d Cong., 2d Sess. 9-10, 19-14; H. R. Rep. No. 627, Pt. 3, 63d Cong., 2d Sess. 5 (1914); House Debates (Original Bill), 51 Cong. Rec. 9079-80, 9909-11 (1914); S. Rep. No. 698, 63d Cong., 2d Sess. 10-45 (1914); Senate Debates (Original Bill), 51 Cong. Rec. 13858-9, 13883-13907 (1914); Conference Committee Report, S. Doc. No. [illegible] 63d Cong., 2d Sess. 4 (1914); Senate Debates, 51 Cong. Rec. 15821-27, 15938-40, 16001-04, 16046-47, 16058-59, 16144, 16170 (1914); House Debates, 51 Cong. Rec. 16276, 16312, 16344 (1914).

plea of guilty") prima facie evidence", and he added, "*it ought to*" (*id.* at 15825). In the House, Conferee Webb, asked whether the prima facie rule would attach to a judgment entered on a "plea of guilty", affirmed that because of the proviso "such judgment does not have a 'prima facie' effect . . ." (*id.* at 16276).

The court of appeals, on the basis of the plain meaning of the section and its history, correctly rejected the argument that the proviso applies only in civil situations; the estoppel provision buttresses that conclusion because the ordinary civil consent decree, entered before testimony is taken, creates no estoppel. See, e.g., *Lawrence Mfg. Co.* v. *Tennessee Cotton Mills*, 138 U.S. 552, 562 (1891); *United States* v. *International Building Co.*, 345 U.S. 502, 506 (1953). Thus, the section read as a whole and in the light of this Court's decision in *Emich* explains why the congressional debates, which virtually comprise the legislative history of the proviso, acknowledged the exemption of guilty-plea judgments from the operation of the section as the proviso's overriding purpose and predictable effect and concentrated on the merit of that expressly intended result.

The concern voiced in the majority opinion below for accommodation of the conflicting policies of the section's main provision and its proviso (App. [illegible]) is consequently misplaced. The policy accommodation Congress intended is plain in the legislative history. The court below would reject the congressional intent and would instead allow the policy of the main provision to annul the policy of the proviso.

3. Fundamental to the majority's rationale was a claimed distinction between *nolo* and guilty plea judgments as "consent judgments" within the meaning of the proviso. The distinction is without logical or historical support; it

rests on reasoning that ignores the realities of the situation and conflicts with Rule 11 of the Federal Rules of Criminal Procedure and with principles enunciated in this Court's decision in *Lynch* v. *Overholser*, 369 U.S. 705, 719 (1962).

The majority recognized that neither plea requires the express consent of the government, but it concluded that a *nolo* judgment is a consent judgment because it requires the consent of the defendant and the court, whereas the guilty judgment is not a consent judgment because, in the view of the majority, it requires only the consent of the defendant. In fact, as already indicated at pp. 10-12, *supra*, the legislative history makes it clear that Congress used the term to denote the consent of the defendant. *Twin Ports Oil Co.* v. *Pure Oil Co.*, 26 F. Supp. 366, 376 (D. Minn., 1939).

But even on its own premises, the majority's rationale is fallacious. Rule 11 of the Federal Rules of Criminal Procedure, set forth at pp. 3-4, *supra*, states without qualification that a "court may refuse to accept a plea of guilty . . . ." As pointed out by the Court of Appeals for the District of Columbia, this "permissive clause . . . indicates a general discretion in the court . . ." to refuse guilty pleas. Nor is this provision modified or limited by the further provision that the court "shall not accept the [guilty] plea without first determining that the plea is made voluntarily with understanding of the nature of the charge," for this "mandatory clause . . . [merely] indicates one circumstance where the court has no discretion but must refuse to permit the guilty plea." *Overholser* v. *Lynch*, 288 F.2d 388, 391, 392 (D.C. Cir. 1961).

The Supreme Court specifically approved this analysis of Rule 11, pointing out that its disagreement with the circuit court on another issue "does not mean . . . that a criminal defendant has an absolute right to have his guilty plea

accepted by the court. As provided in Rule 11 . . . the trial judge may refuse to accept such a plea and enter a plea of not guilty on behalf of the accused." *Lynch*, v. *Overholser*, 369 U.S. 705, 719 (1962). On this point the minority opinion by Mr. Justice Clark is similarly emphatic: to grant a defendant "an absolute right to plead guilty . . . would be *contra* to our concept of the fair administration of justice as exemplified in . . . Rule 11 . . . ." 369 U.S. at 731. Particularly pertinent here is *United States* v. *Willis*, 75 F. Supp. 628, 631 (D.D.C. 1948), which asserts the right of a district court, in the exercise of its discretion to accept or reject a proffered plea of guilty granted it by Rule 11, to take into consideration less onerous consequences accruing to a defendant under the governing statute from a plea of guilty than from a possible verdict of guilty after trial.

It follows that a judgment entered on a plea of guilty is in fact more certainly based on the consent of all concerned than is a *nolo* judgment. For, as Judge Knoch's dissent (App. 7-8) cogently demonstrates, a plea of guilty manifests the mutual willingness of the parties to dispose of the case on the terms offered by one of them, the government, whereas the *nolo* plea can be and often is entered over the objection of the government. E.g., *United States* v. *Safeway Stores, Inc.*, 20 F.R.D. 451, 455-459 (N.D. Tex. 1957); *United States* v. *Cigarette Merchandisers Ass'n*, 136 F. Supp. 212 (S.D. N.Y. 1955); *United States* v. *Jones*, 119 F. Supp. 288 (S.D. Cal. 1954).[5]

5. The majority erroneously asserts that the federal courts in practice follow the recommendation of government attorneys in accepting *nolo* pleas. As Judge Nordbye pointed out in a recent opinion in which he accepted a plea of *nolo contendere* over the government's objection (United States v. Minneapolis-Honeywell

Thus the consent deemed determinative by the court of appeals, the consent of the court, is as much implicit in a guilty plea as in a *nolo* judgment. Normally courts do accept pleas of guilty for, as Judge Knoch pointed out, by such a plea "the government has secured all that the government sought in bringing the charges" (App. 8). Indeed, the disposition of cases by plea—before the trouble and expense of trial is incurred—is ordinarily considered laudably conducive to the interest and proper administration of justice. Because the guilty plea does represent total capitulation to the government's demands, the guilty plea judgment is, moreover, always based on the consent of *all* parties and the court, the same consensual elements present in the civil situation. The *nolo* judgment, as the court of appeals properly held, is unquestionably a consent judgment, based as it is on the consent of defendant and court, even though it is only sometimes consented to by the government. Certainly guilty plea judgments, meeting even a criterion of complete mutuality, must also be termed consent judgments. And particularly should they be so in the circumstances of these actions which involve pleas and judgments entered by the express consent of the parties and the sanction of the court (Dft. App. 4-11).

Regulator Co., Trade Reg. Rep. ¶ 70,863 at p. 78,495 (D. Minn., Jan. 11, 1963):

> "The Government for some years has consistently opposed the acceptance of *nolo contendere* pleas in antitrust proceedings. It appears, however, that since 1955 and up to February, 1963, pleas of *nolo contendere* have been accepted by the United States courts in some 104 antitrust cases out of 142 where pleas of *nolo contendere* have been tendered . . . some 73 per cent of the antitrust cases during the past eight years."

CONCLUSION

For the reasons stated, petitioners respectfully request that the writ of certiorari be granted.

Respectfully submitted,

Dated: January 27, 1964.

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APPENDIX

As reported at 323 F.2d 412 (1963)

COMMONWEALTH EDISON COMPANY et al.,
Plaintiffs-Appellants,

v.

ALLIS-CHALMERS MANUFACTURING COMPANY, et al.,
Defendants-Appellees.

No. 14024.

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT.

Sept. 12, 1963.

Rehearing Denied Oct. 30, 1963.

[413]

Before KNOCH, KILEY, and SWYGERT, Circuit Judges.

KILEY, Circuit Judge.

This court allowed plaintiffs[1] to appeal from an order striking from the complaints in 226 related treble damage civil antitrust cases all references to judgments, on pleas of nolo contendere and guilty, entered in the 1960 Philadelphia criminal antitrust cases.

The District Court certified[2] the following question, decided in its order, as an important and controlling question of law in those cases: whether plaintiffs in their private antitrust cases may have the prima facie evidentiary benefit provided by § 5(a) of the Clayton Act[3] with respect to judgments entered on pleas of nolo contendere and guilty

1. In the civil "electrical equipment antitrust" cases.
2. Pursuant to 28 U.S.C. § 1292(b).
3. 15 U.S.C. § 16.

in prior criminal [414] antitrust cases against the same defendants. The question is of first impression in this Circuit.[4]

In § 5(a) of the Clayton Act.[5], Congress provided, *inter alia*, that plaintiffs in treble damage actions could make use of final judgments in prior civil or criminal antitrust proceedings brought by the Government as prima facie evidence of violations of antitrust laws, except in cases terminated by "consent judgments * * * entered before any testimony has been taken." The complaints before us allege the violations by virtue of defendants' pleas and the corresponding judgments in the Philadelphia criminal cases. Defendants moved to strike all references to the prior criminal proceedings.

The District Court granted the motion, deciding that judgments on both nolo contendere and guilty pleas came within the term "consent judgments" in the proviso in § 5(a) and were therefore unavailable to plaintiffs for the prima facie benefit.

We see no merit in plaintiffs' contention that the exclusionary proviso ["* * * this section shall not apply to consent judgments or decrees entered before any testimony has been taken * * *"] in § 5(a) does not extend to judgments in criminal cases. We think the plain words of the statute indicate Congress intended to include judgments in criminal cases in the proviso. The main section of § 5(a) uses the words "in any civil or criminal proceeding." The

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4. The question is pending in the U. S. Courts of Appeals for the Fifth and Ninth Circuits.

5. The section [15 U.S.C. § 16] provides, in pertinent part, as follows:

> "(a) A final judgment or decree * * * rendered in any civil or criminal proceeding brought by or in behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States * * *, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken * * *."

exclusionary proviso does not expressly refer either to civil or criminal proceedings; it merely says "judgments or decrees." When the section was originally enacted, however, it contained a temporary proviso, since eliminated, stating: "Provided, further, This section shall not apply to consent judgments * * * rendered in criminal proceedings * * * now pending * * *."

The exclusionary proviso with which we are concerned was located between the clear words in the main section and the temporary proviso. It is our opinion that Congress did not use the term "judgment" in the exclusionary proviso in a sense different from that in the main section and in the temporary proviso. Had Congress intended in the exclusionary proviso to refer only to civil judgments, we think it would have clearly said so.

We do not agree either that in criminal cases there can be no consent judgments. There is ample authority that judgments entered on pleas in criminal cases are within the proviso. Twin Ports Oil Co. v. Pure Oil Co., 26 F.Supp. 366 (D.Minn.1939), aff'd. 119 F.2d 747 (8th Cir. 1941), cert. denied, 314 U.S. 644, 62 S.Ct. 84, 86 L.Ed. 516. Barnsdall Refining Corp. v. Birnamwood Oil Co., 32 F.Supp. 308, 311 (E.D.Wis.1940). Alden-Rochelle, Inc. v. ASCAP, 3 F.R.D. 157 (S.D.N.Y.1942). United States v. Standard Ultramarine & Color Co., 137 F.Supp. 167 (S.D.N.Y.1955). Atlantic City Electric Co. v. General Electric Co., 207 F. Supp. 620 (S.D.N.Y.1962).

The decisions in those cases involved pleas of nolo contendere and therefore also support the District Court's ruling that judgments entered on pleas of nolo contendere are within the proviso and thus are unavailable for the prima facie benefit of § 5(a). We agree with Judge Learned Hand's statement that such judgments are "plainly * * * within the [exclusionary] proviso * * *." [415] Pfotzer v. Aqua Systems, Inc., 162 F.2d 779, 784 (2d Cir. 1947).

There are clear elements of consent in a plea of nolo contendere. The plea requires the consent of the District Court. Rule 11, Federal Rules of Criminal Procedure. And in practice pleas of nolo contendere are rarely accepted by

courts without the approval of the Government after compromise negotiations with the Government. The record of the Philadelphia criminal proceedings in the case at bar bears that out. See also Twin Ports Oil Co. v. Pure Oil Co., 26 F.Supp. 366, 372 (D.Minn.1939), and 152 A.L.R. 270-271.

The principal issue is whether judgments entered on guilty pleas by defendants in criminal anti-trust actions are within the proviso, and are thus available for the prima facie benefit of §5(a). It is our view that the exclusionary proviso cannot apply to judgments on guilty pleas.

The decisions in Twin Ports Oil Co. v. Pure Oil Co., 26 F.Supp. 366 (D.Minn. 1939) and Barnsdall Refining Corp. v. Birnamwood Oil Co., 32 F. Supp. 308, 311 (E.D.Wis. 1940) involved only the effect of pleas of nolo contendere. This fact weakens the dicta in both cases as to guilty pleas. Also, the record in the case at bar indicates that, despite those decisions, some of the defendants in the Philadelphia proceedings were anxious to avoid guilty pleas.

We see no reason to refer to the congressional debates for the precise meaning of the proviso. Each party here has cited parts of that legislative history with seeming support. We agree with Judge Feinberg in Atlantic City Electric Co. v. General Electric Co., 207 F.Supp. 620, 625 (S.D.N.Y.1962) that the legislative history is "inconclusive" on this question.

We think that Congress did not intend that the proviso include guilty pleas. There is the congressional purpose in enacting §5(a). On this broader question, the legislative history is helpful. The objective was to provide more effective enforcement of the antitrust laws. On the one hand, Congress intended to facilitate the bringing of treble damage suits by private antitrust litigants. Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568, 71 S.Ct. 408, 95 L.Ed. 534 (1951). By giving those litigants the prima facie benefit of judgments obtained by the Government, Congress intended to save those private litigants great time and ex-

pense.[6] And there is evidence that the section has had the effect of encouraging private treble damage actions.[7] On the other hand, by enacting the exclusionary proviso, Congress sought to aid antitrust enforcement by encouraging defendants to capitulate, at a saving of time and expense to the Government.[8] Both purposes of § 5(a) and its proviso serve the broad objective of antitrust enforcement, and although the two purposes are distinct, " * * * an [416] accommodation must be made to preserve the essence of both."[9]

Furthermore, a guilty plea is not a consent plea resulting in a consent judgment. The authorities are uniform that the term "consent judgments" applies to judgments entered by courts following the mutual agreement of the parties. The Ansaldo San Giorgio I, 73 F.2d 40, 41 (2d Cir. 1934), aff'd sub nom. The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., 294 U.S. 494, 55 S.Ct. 483, 79 L.Ed. 1016 (1935). United States v. Hartford-Empire Co., 1 F.R.D. 424, 427

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6. In a Special Message to the Congress, January 20, 1914, President Wilson stated: "I hope that we shall agree in giving private individuals who claim to have been injured by these processes the right to found their suits for redress upon the facts and judgments proved and entered in suits by the Government. * * * It is not fair that the private litigant should be obliged to set up and establish again the facts which the Government has proved. He can not afford, he has not the power, to make use of such processes of inquiry as the Government has command of. Thus shall individual justice be done while the processes of business are rectified and squared with the general conscience." 51 Cong. Rec. 1964 (1914).

7. In 1951, the Assistant Attorney General in charge of the antitrust division of the Department of Justice testified that private suits for treble damages were for the first time becoming of substantial aid to the Department in enforcing the antitrust laws. He referred to those private treble damage suits as "a substantial deterrent." Hearings before the Subcommittee on Study of Monopoly Power of the Committee on the Judiciary, on H. R. 2304, 81st Cong., 2d Sess., pt. 3, p. 15. Cited in United States v. Standard Ultramarine & Color Co., 137 F.Supp. 167, 173 (S.D.N.Y. 1955).

8. 51 Cong. Rec. 13824, 16004 (1914).

9. Mr. Justice Harlan, dissenting in Wood v. Georgia, 370 U.S. 375, 396, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962).

(N.D.Ohio 1940).[10] But a guilty plea in a criminal case is an entirely unilateral act. It does not require the consent of the Government, and there is no authority for the view that courts may reject a plea of guilty, provided it is made "voluntarily with understanding of the nature of the charge." Rule 11, Federal Rules of Criminal Procedure; Atlantic City Electric Co. v. General Electric Co., 207 F.Supp. 620, 626 (S.D.N.Y.1962).[11]

If guilty pleas were held to be within the exclusionary proviso, the private litigant, who is injured by the antitrust violation and who is a subject of Congress' concern in enacting § 5(a), would be, by the defendant's plea of guilty, thereby denied the total benefit of that section. Although that result may achieve one purpose of the section in aiding enforcement of the antitrust laws, we think it would help antitrust violators at the direct expense of the victims of those violations. Congress did not intend to confer a benefit in the body of § 5(a), indicating a primary purpose, and, through the proviso, allow its frustration by the unilateral act of an antitrust violator.

There are also the considerations of self-interest of an accused antitrust law violator. There is no reason for an accused violator to make a defense if guilty pleas are within the proviso. The guilty plea must be accepted, the judgment could not be used in a subsequent treble damage suit and the penalties would almost always be less than the cost of litigation and less painful than a protracted criminal trial. An antitrust defendant in a criminal case would surely consider the effect on its public image and its business that a long trial with damaging evidence might have

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10 Matthews v. Lobley, 132 Tex. 313, 123 S.W.2d 871, 872 (1939); Haggis v. Haggis, 252 Ky. 198, 66 S.W.2d 59 (1933). Black's Law Dictionary, at 978 (4th ed. 1951) gives the following definition: "A judgment, the provisions and terms of which are settled and agreed to by the parties to the action."

11 See also United States v. Morin, 265 F.2d 241, 245 (3rd Cir. 1959), representative of the great number of cases indicating that the discretion allowed by Rule 11 as to guilty pleas is limited to the questions of voluntariness and understanding on the part of the individual defendant.

as compared with the quick and relatively less painful effect of a plea of guilty. That consideration would be even more significant if guilty pleas are within the proviso.

In conclusion, we think that our construction of § 5(a) strikes the balance Congress contemplated between the dual specific purposes of § 5(a). The promotion of private treble damage suits by injured parties and the inducement of capitulation by defendants in proceedings brought by the Government are both valuable in achieving a more effective enforcement of the antitrust laws. Congress intended a choice be made as to the respective values of those purposes by the exercise of the District Court's discretion in a criminal antitrust proceeding. The Court can in a suitable case accept a plea of nolo contendere and save the Government both time and expense; in another case, perhaps where the Government's proof is more than adequate, and the offense of a more serious nature—the court may choose, on Government objection to reject a defendant's capitulation by the nolo plea, thereby serving the specific objective of aiding and promoting the treble damage [417] actions of injured parties. In either case, more effective enforcement of the antitrust laws is achieved, and the choice between the specific objectives of § 5(a) is vested in the District Court, not the antitrust violator.

For the reasons given, the order of the District Court is *affirmed* insofar as it decides that judgments entered on pleas of nolo contendere are within the exclusionary proviso, and *reversed* insofar as it decides that judgments entered on pleas of guilty are within the exclusionary proviso.

KNOCH, Circuit Judge (dissenting):

Reluctantly I find myself unable to agree with Judge Kiley that guilty pleas take a case out of the scope of "consent judgments" within the meaning of § 5(a) of the Clayton Act. I do not follow the reasoning that a plea of guilty cannot be a "consent" to judgment because it requires no further act by the government and may not be rejected by the court, if it is voluntarily made with understanding of the nature of the charges.

A plea of guilty is not a unilateral act taken by the defendant in a legal vacuum. It is a direct response to accusations by the government. The accused accepts those accusations without proof. He agrees to the government's allegations of fact and consents to whatever judgment the court may impose. There is nothing further for the government to do; the government has prevailed; the government has secured all that the government sought in bringing the charges. It is as though an offer were made and accepted as it stands. Such an acceptance is not a counter-offer requiring the further consent of the offeror to make a contract.

Further, I do not find the legislative history "inconclusive." My study of it leads me to the conclusion that a primary Congressional purpose was to induce capitulation of defendants to avoid protracted litigation and to impose additional burdens by way of simplifying individual civil suits only against those who exposed the government to extended and expensive unnecessary trials.

As a plea of nolo contendere requires the approval of the court which may or may not be given, the sole way in which a defendant can conclusively consent to judgment is by way of a plea of guilty.

I would affirm the judgment of the District Court.

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No. 789

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

ALLIS-CHALMERS MANUFACTURING COMPANY; et al.,

Petitioners,

vs.

COMMONWEALTH EDISON COMPANY, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF RESPONDENTS, COMMONWEALTH EDISON COMPANY, et al. IN OPPOSITION

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No. 789

IN THE

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OCTOBER TERM, 1963

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF RESPONDENTS, COMMONWEALTH EDISON COMPANY, et al. IN OPPOSITION

STATUTE AND RULE INVOLVED

Section 5(a) of the Clayton Act, 69 Stat. 283 (1955), 15 U.S.C. § 16(a), reads as follows:

"(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under Section 15a of this

title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided:* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under Section 15a of this title."

The full text of Rule 11 of the Federal Rules of Criminal Procedure is as follows:

> "A defendant may plead not guilty, guilty, or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

ARGUMENT

The petition lacks a concise, explicit statement of reasons why a writ of certiorari should be granted and this is undoubtedly due to the fact that there are no compelling reasons for granting the writ. Rather than squarely facing the criteria set forth in Rule 19, the petition attacks the merits of the court of appeals' opinion in an oblique, but unsuccessful, effort to create a conflict with decisions of this Court. And even though the petition is essentially a brief on the merits of the decision below, it remains apparent that the decision is correct.

I. THE PETITION FAILS TO STATE GROUNDS WHICH JUSTIFY GRANTING A WRIT OF CERTIORARI

The only indication of what petitioners may contend are reasons for granting a writ of certiorari are the three arabic

numerals dispersed intermittently throughout their argument. (Pet'n pp. 7, 9-12) The first of the three introduces the allegation that the "holding of the court below is contrary to that reached and respected in earlier decisions and to those of recent district court decisions." (p. 7)

The vague reference to contrary "earlier decisions" presumably encompasses the cases cited on page 8 of the petition. Candor should have required petitioners to recognize that the decisions thus relied upon contain only *dicta*, not holdings, on the question presented by the petition.[1]

Furthermore, the only conflicts countenanced by Rule 19 as justification for certiorari are either (i) a conflict with a decision of another court of appeals, or (ii) a conflict with a decision of this Court. Petitioners do not, and cannot, point to either.[2]

Moreover, the conflicting district court rulings cited by petitioners,[3] which were considered and rejected by the

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[1] In *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366 (D. Minn. 1939), the case upon which petitioners rely most heavily, the only issue before the court was the effect of a *nolo contendere* plea under the proviso. Statements therein respecting the effect of guilty pleas are not rulings, but *dicta*. The same is true with respect to *Barnsdall Refining Corp. v. Birnamwood Oil Co.*, 32 F. Supp. 208 (E.D. Wis. 1940) and *Alden-Rochelle, Inc. v. ASCAP*, 3 F.R.D. 157 (S.D. N.Y., 1942). In *Northwest Elec. Power Coop. v. General Elec. Co.*, 30 F.R.D. 557, 558-59 (W.D. Mo. 1961), the motion was filed by two corporate defendants who had pleaded *nolo contendere* and the court ruled that the references to the criminal proceedings were immaterial and prejudicial to *those* defendants. Accordingly, the case appears to be limited to the view that *nolo contendere* pleas lead to consent judgments.

[2] Petitioners' repeated citations in the petition of *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366 (D. Minn. 1939) misleadingly indicate that the district court's ruling with respect to the proviso to Section 5(a) was affirmed by the Court of Appeals for the Eighth Circuit. (Pet'n. pp. 8, 11) The fact is that the district court's ruling respecting the proviso was not appealed and the affirmance by the Court of Appeals was concerned entirely with other questions.

[3] *Department of Water & Power v. Allis-Chalmers Mfg. Co.*, 1962 CCH Trade Cas. ¶ 70,656 (S.D. Cal. 1963) (application for leave to file interlocutory appeal granted *sub nom. Pacific Gas & Elec. Co. v. General Elec. Co.* (9th Cir., Mar. 8, 1963); *City of San Antonio v. General Elec. Co.*, No. 3063 and related cases (W.D. Tex., Dec. 7, 1962) (application for leave to file interlocutory appeal granted (5th Cir. Jan. 11, 1963)

court of appeals below, are being reviewed on appeals now pending before the court of appeals for the Fifth and Ninth Circuits. There is no basis for presuming at this time that either court will reach a result in conflict with the Seventh Circuit. Therefore, it is premature to contend that certiorari need be granted to achieve uniformity of construction.

Candor might also have required petitioners to call to the Court's attention the district court opinions squarely holding, as did the court below, that judgments entered on guilty pleas are not "consent judgments" within the meaning of the proviso to Section 5(a): *Sacramento Mun. Util. Dist.* v. *Westinghouse Elec. Corp.*, 1962 CCH Trade Cas. ¶ 70,552, at p. 77,225 (N.D. Cal. 1962); *Simco Sales Service of Pennsylvania, Inc.* v. *Air Reduction Co.*, 1963 CCH Trade Cas. ¶ 70,638, at pp. 77,602-03 (E.D. Pa. 1963).

Petitioners' allegation that it is important to resolve the question here presented prior to trial (Pet'n. p. 6) is not consistent with their lack of diligence in these proceedings. As petitioners well know, the expensive national discovery program provided for the mass of electrical equipment cases is drawing to a close in the immediate future. A target date of May 1, 1964 has already been established for trial of some of the complaints affected by the decision below. If certiorari is granted from the interlocutory ruling, such trials, and perhaps numerous others, might be indefinitely delayed. Since denial of a petition for rehearing by the court of appeals is not a condition precedent to review by this Court, petitioners could have expedited the petition by foregoing the petition for rehearing. Instead, however, petitioners requested and obtained an extension of time to petition for rehearing. Then the petition for certiorari was not filed until the full 90 days after entry of the order denying

rehearing. When petitioners had knowledge that a delay in the decision of this cause could affect the orderly progress of widespread litigation, petitioners had the duty to take every reasonable step to submit their petition to the Court at the earliest possible date. Having failed to meet this obligation, petitioners cannot now rely on the argument that this Court must grant their petition to resolve the question before trial.

In addition, the ruling below is interlocutory. It does not affect the jurisdiction of the district court and reversal would not render trial unnecessary. Nor would any judgment rendered after trial conducted in conformity therewith necessarily be rendered void if there were error in the interlocutory ruling. These facts alone justify denial of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *United States* v. *Beatty*, 232 U.S. 463, 468 (1914); *American Constr. Co.* v. *Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893). This is particularly true here, where granting certiorari could delay prompt trial of numerous cases.

Petitioners also argue that the decision below "overlooks the necessary effect of this Court's decision in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558 (1951) on the construction of the proviso" (p. 9) and "conflicts with principles enunciated in this Court's decision in *Lauch* v. *Overholser*, 369 U.S. 705, 719 (1962)" (p. 13). These contentions are made in passing deference to Rule 19, representing vain attempts to create a conflict "with applicable decisions of this court." However, as petitioners initially acknowledged, the proviso to Section 5(a) was "never before considered by this Court" (Pet'n, p. 8), and, as shown in part II hereof, petitioners have not established any conflict with overriding principles enunciated by the Court.

II. RESPONSE TO PETITIONER'S ARGUMENTS RESPECTING THE MERIT OF THE RULING BELOW

Petitioners allege that the decision below conflicts "in principle" (a) with Rule 11 of the Federal Rules of Criminal Procedure and more particularly the Court's statement on the Rule in *Lynch* v. *Overholser*, 369 U.S. 705, 719 (1962), and (b) with the Court's interpretation of the main body of Section 5(a) in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558 (1951). Analysis shows, however, that the decision below is indeed consistent with, if not required by, the relevant principles enunciated by this Court.

A. Rule 11 of the Federal Rules of Criminal Procedure Expressly Preserved the Plea of Nolo Contendere Because of the Consequences of a Plea of Guilty in Antitrust Cases

The basic purpose of Section 5(a), in recognition of the importance of treble damage actions to effective enforcement of the antitrust laws, is to give persons injured by violations of the antitrust laws the benefit of prior judgments obtained by the Government. *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 568 (1951). A different policy underlies the proviso to Section 5(a): escape from the prima facie effect otherwise accorded under the section was offered to induce defendants to capitulate to the Government's demands, thereby reducing the burden upon the courts and Government in extended trials of antitrust cases.

The ruling of the court below that the exclusionary proviso would apply only to judgments based upon *nolo contendere* pleas and *not* in any event to judgments based upon guilty pleas served to strike a balance between the conflicting purposes inherent in Section 5(a). Since Rule 11 of the Federal Rules of Criminal Procedure provides that the *nolo contendere* plea can be entered *only* with the consent

of the court, this approach affords a safeguard of the public interest and of the congressional purpose to aid injured persons. But if, as petitioners argue, a judgment based on a guilty plea is a "consent judgment," the defendants accused of an antitrust violation would have the unilateral power, by pleading guilty, to avoid the prima facie effect of Section 5(a).

The *nolo* plea was preserved in Rule 11, adopted in 1945, primarily in recognition of its then well established usefulness in antitrust cases to avoid the consequences of a guilty plea under Section 5(a). This is made exceedingly clear in the report of Proceedings of the Institute on the Federal Rules of Criminal Procedure where the Hon. E. Aaron Youngquist commented on the retention of the *nolo* plea:

> "... it was thought by the Committee that this particular plea should be retained because of the effect of a plea of guilty in an anti-trust case, for instance, and the implication that arises from the Clayton Act and all those things. It is used and has been used in the past to a very considerable extent." *New York University School of Law, Proceedings of the Institute on Federal Rules of Criminal Procedure*, Vol. VI, p. 162 (1946)
>
> "[Retention of the *nolo* plea] was designed primarily to deal with the consequence of a plea of guilty in a criminal anti-trust case in connection with a treble damage suit following it, and it was thought that for practical purposes it would be better to let a corporation, for instance, charged with the violation of the anti-trust laws plead *nolo contendere* rather than to plead guilty because of the consequences that might follow." (*Id.* at 188).

This explicit statement of the public policy behind the retention of the *nolo* plea has subsequently been acknowl-

edged in decisions of several district courts: *E.g. United States* v. *Cigarette Merchandisers Ass'n, Inc.*, 136 F. Supp. 212-13 (S.D.N.Y. 1955); *United States* v. *B. F. Goodrich Co.*, 1957 CCH Trade Cas. ¶ 68,713 at p. 72,878 (D.C. Colo. 1957); *United States* v. *Safeway Stores, Inc.*, 20 F.R.D. 451 (N.D. Tex. 1957); *United States* v. *Brunswick-Balke-Collender Co.*, 1962 CCH Trade Cas. ¶ 70,282 (E.D. Wis. 1962).

This distinction between the consequences of a plea of guilty and a plea of *nolo contendere* was recognized by counsel for the defendants in these proceedings when the pleas were proferred in the criminal cases. Thus, counsel for Federal Pacific said:

> "If Your Honor, by refusal to accept nolo pleas, places a smaller company like this in great jeopardy as a result of litigation which might result from these indictments by forcing a plea of guilty, Your Honor may put Federal Pacific Electric Company in the position where it will be either driven out of business or so severely injured that it could provide no competition of any kind . . .
>
> "This is a basic reason why I think Your Honor ought to accept a plea of nolo." *Hearings before Judge Ganey*, November 21, 1960, p. 214.

Similarly, counsel for General Electric stated:

> ". . . I hope Your Honor realizes that if corporations are permitted to plead nolo contendere and G.E. and Westinghouse are not, it is not just a question of relieving those corporations of a treble damage liability, but it is a determination by Your Honor that a great proportion of that damage must be assessed against General Electric and Westinghouse. I suggest that the pleas are not to be used as the basis for bargaining among corporate defendants on the question of subsequent liability in litigation not yet brought." *Hearings before Judge Ganey*, November 21, 1960, p. 262.

Contrary to the thrust of petitioners' argument, the traditional distinction between guilty and *nolo contendere* pleas incorporated into Rule 11 was not affected by the Court's decision in *Lynch* v. *Overholser*, 369 U.S. 705, 719 (1962). That opinion recognizes only that there may be exceptional circumstances under which a trial judge could refuse a guilty plea and enter a not guilty plea. On the other hand, the important and traditional distinction recognized by the court below is that a *nolo contendere* plea cannot be entered under any circumstances without the prior consent of the court and the prerequisite consent limits use of the *nolo* plea to instances where it serves the public interest.

B. The "Estoppel Clause" in Section 5(a) Does Not Require that the Proviso be Construed to Apply to Judgments Entered after a Guilty Plea

Petitioners' estoppel argument starts with the assumption that the "estoppel clause" in the main provision of Section 5(a)[4] means no more than collateral estoppel by judgment.[5] From this assumption they argue that judgments based on pleas of *nolo contendere* are inadmissible because of the estoppel clause, and therefore the exclusionary proviso must be construed to encompass judgments based on guilty pleas in order to avoid redundancy.

However, the "estoppel clause" obviously refers to the sum of the concepts included within the doctrine of res judicata. This is the only explanation which takes cognizance of the fact that consent judgments, in the proper

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[4] "A final judgment or decree heretofore or hereafter rendered . . . shall be prima facie evidence against such defendant . . . as to all matters respecting which said judgment or decree would be an estoppel . . ."

[5] The question involved here was neither raised nor considered in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558 (1951), the principal authority cited by petitioners in support of their basic assumption. The *Emich* case was concerned solely with the use under Section 5(a) of a judgment entered after conviction on a *not guilty* plea.

sense of the term, are admissible under Section 5(a) in treble damage suits where such judgments have been entered after testimony is taken." And it is indisputable that Congress intended in Section 5(a) to exclude "consent judgments" only when they are entered before any testimony has been taken. Since the taking of testimony does not create an estoppel where none would otherwise exist, the "estoppel clause" cannot be limited in meaning to only collateral estoppel by judgment. In fact, in order to effectuate the Congressional purpose of inducing capitulation to Government suit without expense of trial as expressed in the proviso, the "estoppel clause" must be construed as referring to the entire doctrine of res judicata. Otherwise, defendants could completely defeat both purposes of Section 5(a) by "consenting" to the judgment demanded by the Government, or pleading *nolo contendere* in a criminal prosecution, *after* the Government had presented its case.

Consent decrees, in the proper sense of that term, *United States* v. *International Bldg. Co.*, 345 U.S. 502, 506 (1953); *Standard Oil Co.* v. *Clark*, 163 F.2d 917, 939 (2d Cir. 1947), *cert. denied*, 333 U.S. 873 (1948); *O'Cedar Corp.* v. *F. W. Woolworth Co.*, 66 F.2d 363, 366 (7th Cir. 1933), *cert. denied*, 291 U.S. 666 (1934); and judgments entered after *nolo contendere* pleas, *Rex Trailer Co., Inc.* v. *United States*, 350 U.S. 148, 149 (1956), *aff'g. United States* v. *Rex Trailer Co., Inc.*, 218 F.2d 880 (7th Cir. 1955), are both res judicata. Accordingly, they meet all of the requirements for admissibility under the main body of Section 5(a) and the proviso is essential to exclude them when they are *entered before any testimony has been taken.*

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[1] *E.g., Charles Rubenstein, Inc.* v. *Columbia Pictures Corp.*, 289 F.2d 418, 422 (8th Cir. 1961), *aff'g.* 176 F. Supp. 527, 536 (D. Minn. 1959); *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F.2d 846, 853 (8th Cir.) *cert. denied*, 342 U.S. 942 (1952); *Webster Rosewood Corp.* v. *Schine Chain Theatres, Inc.*, 157 F. Supp. 251, 254-56 (N.D. N.Y. 1957), *aff'd.* 263 F.2d 533 (2d Cir.) *cert. denied*, 360 U.S. 942 (1959).

Thus, there is no redundancy in the proviso and there can be no justification for resort to legislative debates to alter its plain meaning in order to bring judgments on guilty pleas within the concept of a "consent judgment."

In fact, petitioners' redundancy argument is confounded by their own contention that a judgment entered on a guilty plea is a "consent judgment." If judgments entered on guilty pleas are "consent" judgments, then they would create no estoppel for the same reasons as are applicable to any consent judgment in the proper sense of the term. Thus, as interpreted by petitioners, the proviso becomes not only redundant, but completely meaningless, because all civil consent judgments and criminal judgments entered on pleas of either guilty or *nolo contendere*, before or after testimony has been taken, would be inadmissible under the estoppel clause in the main body of Section 5(a).

C. The Legislative History is Not Authoritative on the Construction of Section 5(a) and Cannot be Used to Overturn Clear Statutory Language

It is not the statutory language, but legislative history upon which petitioners rely to support their contention that the exclusionary proviso extends to judgments entered on pleas of guilty. If we look to the language of the statute itself and give the phrase "consent judgments and decrees" its normal and customary meaning (*Federal Trade Comm'n* v. *Sun Oil Co.*, 371 U.S. 505, 512, 514 (1963); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 388 (1951)), it is clear that the proviso does not apply to judgments on guilty pleas. Where the statutory language is clear and unambiguous resort to legislative history is unwarranted. *Sunshine Biscuits, Inc.* v. *Federal Trade Comm'n*, 306 F.2d

48, 51 (7th Cir. 1962); *Sturges v. Crowninshield*, 4 Wheat. 122, 202 (1819); *Hamilton v. Rathbone*, 175 U.S. 414, 421 (1899). In any event, the legislative history would have to be both authoritative and exceedingly clear in order to justify a judicial construction which is contrary to the normal and customary meaning of the statutory language.

The legislative history of Section 5 fails to meet either standard. The legislative history has now been examined by a number of district courts and virtually all frankly recognize the "perplexing problems" which it presents. (Pet. App. 71a; *United States v. Standard Ultramarine & Color Co.*, 137 F. Supp. 167 (S.D. N.Y. 1955); *Atlantic City Electric Co. v. General Electric Co.*, 207 F. Supp. 620, 625 (S.D. N.Y. 1962); *United States v. B. F. Goodrich Co.*, 1957 CCH Trade Cas. ¶ 68,713, at p. 72,877 (D. Colo. 1957).

The confusion and conflicting opinions are the inevitable result of the fact that the legislative history consists, not of studied, written Committee reports, but solely of ambiguous statements made during the floor debates. It is not difficult to demonstrate the implausibility of any assumption that the Senate heard or understood, let alone agreed with, petitioners' tortured construction of "consent judgments or decrees." Repeated quorum calls were necessary because of the lack of attendance during the filibuster engaged in by Senators opposing the Clayton Act, 51 Cong. Rec. 15826, 15988, 16009, 16042, 16061, 16156 (1914); and the inattention of the handful of Senators who were present from time to time is also evident from the Congressional Record. 51 Cong. Rec. 15938, 16047 (1914).

While petitioners purport to rely upon statements of Senate proponents of the Clayton Act, there can be no doubt that support for the petitioners' view is limited to statements by the opposition Senators who were attempting to prevent enactment of Section 5. Petitioners thus ride

upon the proponents and the entire Senate the burden of correcting every misstatement of the opposition Senators at the peril of having those statements used as the basis of overturning clear statutory language. The argument from such legislative history provides a classic example of the rationale for the rule that the views of the opposition are not authoritative under any circumstances. *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 288, n. 22 (1956); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951).

For the foregoing reasons respondents respectfully suggest that the petition for a writ of certiorari be denied.

Respectfully submitted.

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NO. 789

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

ALLIS-CHALMERS MANUFACTURING COMPANY, et al.,

Petitioners,

vs.

COMMONWEALTH EDISON COMPANY, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PETITIONERS IN REPLY TO RESPONDENTS COMMONWEALTH EDISON COMPANY, ET AL. BRIEF IN OPPOSITION

(Names and Addresses of Counsel Appear at the end of this Brief)

TWENTIETH CENTURY PRESS, INC., CHICAGO 60605

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The petition presents "an important question of federal law which has not been, but should be settled, by this court . . ." (Rule 19). This the respondents do not deny nor do they deny that it involves a significant antitrust statutory provision never considered by this court (Petition, pp. 7-8). Despite the findings of both courts below that the question presented is controlling and should be settled before trials are begun, respondents urge that petitioners should be deemed to have waived the opportunity to apply to this Court for review because they used the time the statute allows for filing their petition.

I. Petitioners should not be penalized for complying with the statute. It should be plain that they waited the full

statutory period in the hope that decisions would be rendered in the cases involving the same issue pending in two other circuits.[1]

The question presented has been decided favorably to petitioners by three district courts, including Judge Robson's decision below. When the Seventh Circuit reversed on the basis of a self-contradictory rationale, petitioners asked, and because of the strong and cogent dissent written by Judge Knoch, had reason to hope for rehearing. Forced by the majority's denial of that petition to come to this Court, petitioners naturally waited for decisions in the other circuits. Had one of those decisions been affirmed within the statutory period ending January 28, 1964, petitioners would have been able to show the direct conflict which respondents seem to view as creating a right to the granting of the petition. Even if both decisions had been unfavorable, the Court's time would have been conserved by the filing of simultaneous petitions in all cases. Petitioners were certainly not unreasonable in hoping for decisions before January 28, 1964 on appeals initiated at about the same time as theirs and argued on May 1, 1963 (Fifth Circuit) and November 15, 1963 (Ninth Circuit). But, as the time for filing drew near and decisions in the other circuits were still outstanding, petitioners had to decide either to file a petition in these cases or to acquiesce

1. Department of Water & Power v. Allis-Chalmers Mfg. Co., Trade Reg. Rep. (1963 Trade Cas.) ¶70,656 (S.D. Cal. 1963), application for leave to file interlocutory appeal granted Mar. 8, 1963 (9th Cir., No. 18475); City of San Antonio v. General Elec. Co., No. 3063 and related cases (W.D. Tex., Dec. 7, 1962), application for leave to file interlocutory appeal granted Jan. 11, 1963 (5th Cir., No. 20279).

in an unfavorable decision which places a plainly erroneous construction on an important antitrust statutory provision.

There is no basis for respondents' assertion that granting the petition will delay trials of cases pending in the Northern District of Illinois. Petitioners know of no May 1 target date for the trial of any of these cases. Certainly no such date has been established by the district court below. On the contrary, Judge Robson has certified, and the Court of Appeals on January 20, 1964 agreed to review, another controlling question of law under the Interlocutory Appeals Act, and the District Court has informed the parties that no trial will take place until that new issue shall be resolved on appeal. The time permitted for briefing on appeal of that new issue will not expire until about the middle of May. After briefs are filed, oral argument will be held and in due course a decision rendered.

2. The respondents' unwarranted and surprising statements as to the trial schedule in these cases are apparently occasioned by their inability to deny that the petition presents an important question that should be settled by this Court—one that has been erroneously decided below. Indeed, the decision below has forced respondents to an interpretation of the estoppel provision of Section 5(a) (see Brief in Opposition, pp. 9-11) which amounts to a demonstration of the fallacy of that decision by the classic method of *reductio ad absurdum*.

For under that decision, respondents can instill the proviso to Section 5(a) with meaning and purpose only by asserting, as they do, that judgments based on pleas of *nolo contendere* create an estoppel within the meaning of the proviso. That assertion flies in the face of the reported decisions recognizing that *nolo* judgments are excluded from Section 5(a) by virtue of its estoppel clause.[2] That the doctrine of collateral estoppel, involving adjudicated *facts*, is quite different and distinct from the doctrine of *res judicata*, involving the adjudication of *rights* with respect to a particular issue, is made plain in the very cases respondents cite. See, e.g., *United States* v. *International Bldg. Co.*, 345 U.S. 502, 506 (1953). It is the determination of evidentiary facts with which Section 5(a), by virtue of its language, its purpose, and its content, is concerned. And the clear holding of this Court in *Emich Motors* v. *General Motors*, 340 U.S. 558, 568 (1951) is that "the evidentiary use which may be made under §5 of the prior [criminal judgment] . . . is . . . to be determined by reference to the general doctrine of estoppel." See also *International Shoe Mach. Corp.* v. *United Shoe Mach. Corp.*, 315 F.2d 449, 454 (1st Cir.), *cert. denied*, 375 U.S. 820 (1963); *Buckhead Theatre Co.* v. *Atlanta Enterprises, Inc.*, Trade Reg. Rep., ¶71,006 (5th Cir., Jan. 21, 1964). Under that general doctrine *nolo* judgments create no estoppel

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2. Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366, 378 (D. Minn. 1939); Barnsdall Ref. Corp. v. Birnamwood Oil Co., 32 F. Supp. 308, 313 (E.D. Wis. 1940); Ulrich v. Ethyl Gasoline Corp., 2 F.R.D. 357, 359 (W.D. Ky. 1942); United States v. Jones, 119 F. Supp. 288, 290-91 (S.D. Cal. 1954); United States v. B. F. Goodrich Co., Trade Reg. Rep. (1957 Trade Cas.) ¶68,713 at p. 72,879 (D. Colo. 1957); United States v. Cigarette Merchandisers Ass'n., 136 F. Supp. 212, 213 (S.D. N.Y. 1955); United States v. Standard Ultramarine & Color Co., 137 F. Supp. 167, 170 (S.D. N.Y. 1955).

Hudson v. United States, 272 U.S. 451, 455 (1926); *United States v. Norris*, 281 U.S. 619 (1930).

3. It is impossible to follow respondents' argument on the estoppel provision largely because its premises are wrong. No case supports the threshold statement that every civil consent decree entered after testimony has been taken is admissible in a later treble damage action as prima facie evidence under Section 5(a). Petitioners are aware of only one case in point, Ulrich v. Ethyl Gasoline Corp., 2 F.R.D. 357, 359 (W.D. Ky. 1942), and it held to the contrary; on motion to strike, an equity consent decree was held not to be exempt from the provisions of Section 5 by reason of its proviso because testimony had been taken; at trial, however, it was held inadmissible under Section 5 because it created no estoppel. The cases respondents cite (Brief in Opposition, p. 10 n. 6) do not support their statement. They involved the *Paramount* consent decrees based on trial court findings of fact, made after full trial and upheld by this Court. The consent decrees were entered after that trial and appeal, but before commencement of trial on a limited remand. See DeLuxe Theatre Corp. v. Balaban & Katz Corp., 95 F. Supp. 983, 985-86 (N.D. Ill. 1951); Grand Opera Co. v. Twentieth Century-Fox Film Corp., 137 F. Supp. 305, 308 (E.D. Ill. 1955); Webster Rosewood Corp v. Schine Chain Theatres, 157 F. Supp. 251, 256 (N.D. N.Y. 1957). Most defendants in the later treble damage suits in which the consent decrees were offered under Section 5 made no claim that the consent decrees were inadmissible because of the estoppel provision; obviously, the decrees created an estoppel as to the facts judicially determined—as, indeed, appears in two of the cases cited by respondents (p. 10 n. 6) in which the decrees were admitted only for the limited purpose of proving such relevant facts as the decrees would estop between the original parties. Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F.2d 846, 853 (8th Cir. 1952); Webster Rosewood Corp. v. Schine Chain Theatres, 157 F. Supp. 251, 255-256 (N.D. N.Y. 1957). Defendants in some cases, including those cited by respondents, argued that the decrees should be entirely excluded under the proviso because they were entered before testimony was taken on the remand. But because the remand was for determination of limited issues, and not for a new trial, the courts uniformly rejected the suggestion that there had been no testimony.

Accordingly, for the reasons stated here and in their petition, petitioners ask that their petition be granted.

Respectfully submitted.

Dated: February 18, 1964

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